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No. 93-1405

In the Supreme Court of the United States

OCTOBER TERM, 1993

NICHOLAS PARLAVECCHIO AND ANTONINO PARLAVECCHIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions for conspiring to possess cocaine with the intent to distribute it.

2. Whether the evidence was sufficient to support petitioners' convictions for attempting to distribute cocaine.

3. Whether the district court properly admitted certain recorded conversations in evidence.

4. Whether the district court properly sentenced petitioners on the basis of a finding that they negotiated to distribute 30 kilograms of cocaine.

5. Whether the government engaged in "sentencing entrapment."

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OPINION BELOW

The judgment orders of the court of appeals, Pet. App. 3a-5a, 6a-8a, are unreported.

JURISDICTION

The judgments of the court of appeals were entered on October 18, 1993. A petition for rehearing was denied on December 7, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on March 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiring to conduct an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846; attempting to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); using a telephone in furtherance of a cocaine conspiracy, in violation of 21 U.S.C. 843(b); conspiring to counterfeit credit cards, in violation of 18 U.S.C. 1029(b)(2); trafficking in counterfeit credit cards, in violation of 18 U.S.C. 1029(a)(1); and wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 15a-18a, 28a-31a. The district court sentenced Nicholas Parlavecchio to a total of 210 months' imprisonment, to be followed by five years' supervised release. *Id.* at 32a-34a. The court sentenced Antonino Parlavecchio to a total of 168 months' imprisonment, to be followed by five years' supervised release. *Id.* at 19a-21a. The court of appeals affirmed. *Id.* at 3a-5a, 6a-8a.

1. The evidence at trial showed that petitioners engaged in a conspiracy to distribute cocaine and to obtain money and property by means of false pretenses. In late 1988, Nicholas Parlavecchio loaned Hamilton Campos $7,500 in order to help finance a conspiracy to import heroin from Brazil and sell it in the United States. Some of the heroin was sold and Campos repaid some of the money, but he did not sell

the rest of the heroin and still owed Nicholas approximately $3,700. Gov't C.A. Br. 5-6.

Campos later contacted Nicholas and Antonino Parlavecchio, explaining that he would repay the outstanding debt to Nicholas from profits obtained from planned cocaine sales. Campos devised a scheme to import cocaine from Brazil and to distribute it in the United States and Italy. In May 1989, Campos attempted to recruit Erastro Campos Filho and Ricardo Valente, who were in Brazil, to help him. Hamilton Campos discussed the plan with the Parlavecchios using the code words "car wash," "brushes," and "rollers" to refer to kilograms of cocaine.[1] Antonino and Campos discussed importing seven kilograms of cocaine into the United States, with the Parlavecchios planning to act as brokers. Nicholas introduced Campos to one "J.R.," who was interested in purchasing 125 grams of cocaine, and Antonino asked to be given an opportunity to invest in any deal Campos made with "J.R." Nicholas also agreed to negotiate with a potential Italian cocaine buyer. After contacting the individual, Nicholas reported to Campos that the requested price was too high. Campos instructed Nicholas to get a counteroffer, which he agreed to do. Gov't C.A. Br. 6.

On June 30, 1989, Campos was arrested and subsequently agreed to cooperate with the police in their ongoing investigation of the Parlavecchios. On July 1, 1989, Campos telephoned Nicholas and, using

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[1] Nicholas Parlavecchio owned a car wash in Newark, New Jersey. In May 1989, law enforcement officers obtained a wiretap on both the car wash and Nicholas's residence. The conversations described in the text were recorded and the audio tapes were introduced at trial. Gov't C.A. Br. 3, 5.

the familiar "car wash" code, told him that 60 kilograms of cocaine were available. The Parlavecchios again sought to play the role of broker. Campos told Nicholas that the 60 kilograms would cost $12,000 per kilo, and Nicholas said he had a contact who would take the cocaine in Spain, or "here, if the price was right." Gov't C.A. Br. 7.

The following morning, July 7, 1989, Nicholas told Antonino to talk to an Andrew Giovinazzo, who was in Florida, about the "60-12"—the 60 kilograms of cocaine at a unit price of $12,000. A few hours later, Giovinazzo called from Florida and offered $11,000 per kilogram and requested one week's advance credit. Nicholas reported the offer to Campos. Campos, however, said that he wanted $12,000 cash, and would not sell on credit. Nicholas and Campos agreed to split the $1,000-per-kilo profit if the cocaine were sold for $12,000. Nicholas said he would try to interest Giovinazzo "once more with that," and that he had other "people who were interested" in the drugs. Gov't C.A. Br. 7-8.

Over the next few days, the conspirators had a number of telephone conversations. On July 11, 1989, Nicholas told Campos that a deal in Spain was "solid," but that he didn't think the deal for "here" would happen. Later that same day, Nicholas told Campos that he would find out Giovinazzo's "bottom figure." Campos subsequently agreed to sell the cocaine to Nicholas's buyers for $11,000. Gov't C.A. Br. 7-8.

On July 20, 1989, at 10:24 a.m., Nicholas told Campos that he had a "definite thing," but asked if it could be in "2s or 3s," *i.e.*, lots of two or three kilograms, rather than "tens and twenties," and told Campos that he would confirm the details by 1:00 p.m. After

speaking with Giovinazzo, Nicholas informed Campos that "[w]e'll take 10," and that he wanted to consummate the deal "down there," referring to Florida. Gov't C.A. Br. 8.

On July 24, 1989, Nicholas told Campos that they needed five "here" (in New Jersey) and ten "down there" (in Florida). Campos said that Florida was "too hot," referring to law enforcement activity, and told Nicholas to ask Giovinazzo if he could pick up the cocaine in New Jersey. On July 25, Nicholas informed Campos that Giovinazzo wanted to look at one kilogram of cocaine. Nicholas told Campos that if they looked at "one" and thought it was "quality, we'll sell 10 right away to each guy, three different guys," but that Campos had to "show" the cocaine. Campos balked at that, indicating that they "won't let him go with one." Gov't C.A. Br. 8.

On July 27, 1989, Nicholas informed Campos that there was "the potential for 30" (*i.e.*, 30 kilograms of cocaine), but that "if [Giovinazzo] don't see it, they're not gonna move." Nicholas explained that Daniel Dellisanti, who worked with Giovinazzo, agreed to examine the cocaine in New Jersey. Nicholas added that Dellisanti is the one who "determines and tells the guy down there [Giovinazzo] that it's okay, and then there'll be, there'll be a thirty." Campos then confirmed that "three" could be done immediately, to which Nicholas responded, "What three? Thirty." Nicholas added that the buyers no longer wanted credit, but "they want[ed] to look." Gov't C.A. Br. 9.

Campos, Dellisanti, and the Parlavecchios agreed to meet at the car wash, and Campos promised to bring a kilogram of cocaine to show Dellisanti. When Campos, accompanied by Roy Diaz, an undercover

Drug Enforcement Administration (DEA) agent, arrived at the car wash, Dellisanti was not present. Nicholas instructed them to leave the cocaine with him and he would show it to Dellisanti. Campos refused, because he was not authorized to relinquish control of the sample. After Dellisanti returned, Nicholas explained the situation to him, and Dellisanti left without meeting Campos or seeing the cocaine. Gov't C.A. Br. 10-11.

Campos then called Nicholas for an explanation. Nicholas stated that Dellisanti was suspicious because Campos could not release a sample and had brought a stranger (Diaz) with him. Nicholas expressed skepticism that Giovinazzo would go through with the purchase. Campos then obtained the DEA's permission to release a small sample of cocaine. On August 9, 1989, Campos told Antonino to tell Nicholas that the sample was available. Antonino explained that Nicholas was away, but that he could "handle whatever it is." Gov't C.A. Br. 11-12.

On August 17, 1989, Campos delivered a two-gram cocaine sample to Antonino, who subsequently turned it over to Nicholas. Campos told Antonino to tell Nicholas to move fast, because there were 32 kilos of cocaine left. Antonino replied that doing the transactions "this week" would be "no problem." Later that same day, Nicholas informed Campos that the potential buyer had said the sample was "not quality" and refused to go through with the deal. Negotiations were subsequently discontinued. Gov't. C.A. Br. 12.[2]

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[2] The evidence relating to wire fraud and conspiracy to counterfeit credit cards (summarized at Gov't C.A. Br. 12-15) is unrelated to this petition.

2. At sentencing, the district court rejected the probation office's recommendation that the conspiracy to distribute involved ten kilograms of cocaine. Instead, the court found, by a preponderance of the evidence, that the proposed cocaine transaction involved 30 kilograms. VIII Pet. C.A. App. A1889. The court noted that Nicholas Parlavecchio referred to 30 kilograms of cocaine in discussing the transaction and that Nicholas stated that the conspirators could sell ten kilograms to each of three different people. Accordingly, the court found that it was "unequivocally 30 kilograms" of cocaine under discussion. *Ibid.*

The court thus calculated Nicholas's base offense level to be 34. See Sentencing Guidelines § 2D1.1 (c)(5) (15 to 50 kilograms of cocaine). The court refused to make a two-point upward adjustment in the offense level for the firearm found at Nicholas's car wash, but did add two points because Nicholas was shown to be the "organizer or leader" of criminal activity involving fewer than five participants. VIII Pet. C.A. App. A1891; see Sentencing Guidelines § 3B1.1(c). The adjusted offense level of 36, combined with a Criminal History Category I, yielded a Guidelines sentencing range of 188 to 235 months' imprisonment with fines ranging from $20,000 to $4,000,000. The court found that Nicholas had insufficient financial resources to warrant a fine, but sentenced him to a total of 210 months' imprisonment. Pet. App. 32a-33a.

With respect to Antonino Parlavecchio, the court used the same base offense level of 34, but did not make any adjustments. Combined with a Criminal History Category I, Antonino had a Guidelines

sentencing range of 151 to 188 months' imprisonment and a fine range of $17,500 to $4,000,000. The court waived the fine, and sentenced Antonino to a total of 168 months' imprisonment. Pet. App. 19a-20a.

Each petitioner raised the same seven claims on appeal. The court of appeals affirmed without opinion. Pet. App. 3a-5a, 6a-8a.

ARGUMENT

1. Petitioners contend that the evidence was insufficient to support their convictions for conspiring to distribute cocaine. Pet. 10-14. That contention warrants no further review.

To obtain a conviction for drug conspiracy under 21 U.S.C. 846, the government must prove that the defendant agreed with another person to traffic in drugs and that the defendant and another person each knew of, and participated in, the conspiracy. See, *e.g.*, *United States* v. *Guerra-Marez*, 928 F.2d 665, 674 (5th Cir.), certs. denied, 112 S. Ct. 322, 443 (1991). Section 846 does not require proof of an overt act. See, *e.g.*, *United States* v. *Figueroa*, 900 F.2d 1211, 1218 (8th Cir.), cert. denied, 496 U.S. 942 (1990); *United States* v. *Paiva*, 892 F.2d 148, 155 (1st Cir. 1989); *United States* v. *Pumphrey*, 831 F.2d 307, 308-309 (D.C. Cir. 1987); *United States* v. *McCown*, 711 F.2d 1441, 1450 (9th Cir. 1983); but see *United States* v. *Shabani*, 993 F.2d 1419 (9th Cir. 1993), cert. granted, 114 S. Ct. 1047 (1994) (No. 93-981). Circumstantial evidence is sufficient to prove both the existence of an agreement and the defendant's knowledge of the conspiracy. See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Guerra-Marez*, 928 F.2d at 674.

The government's evidence was sufficient to allow a reasonable jury to find petitioners guilty of conspir-

ing between themselves to broker a major cocaine sale. Campos was to be the seller and Giovinazzo the buyer, with Dellisanti, acting on Giovinazzo's behalf, to test the drugs. The agreement between Nicholas and Antonino is clear from the coordinated steps they took in seeking to broker the deal. Nicholas negotiated the price of the cocaine down to $11,000 per kilogram. Nicholas later told Campos that he had found two additional buyers who wanted ten kilograms each. Both petitioners arranged for Campos to show Dellisanti a sample of the cocaine. Antonino took a two-gram sample from Campos, stating that it would be "no problem" to sell 32 kilograms that week. The amount of cocaine under negotiation—30 kilograms—was also large enough to lend additional support to an inference of conspiracy. See *United States* v. *Bourjaily*, 781 F.2d 539, 545 (6th Cir. 1986) (explaining that one kilogram of cocaine is "[a] large volume of narcotics [which] creates an inference of a conspiracy"), aff'd, 483 U.S. 171 (1987). Viewed in the light most favorable to the government, see *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), the evidence suffices to support the conspiracy convictions.[3]

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[3] There is no reason for the Court to hold the petition pending resolution of *United States* v. *Shabani*, No. 93-981 (cert. granted Feb. 22, 1994). Even if proof of an overt act were required under 21 U.S.C. 846, contrary to our submission in *Shabani*, it would not assist petitioners. Petitioners were shown to have taken several concrete steps in furtherance of their cocaine-distribution conspiracy, and that proof would satisfy the overt-act requirement, if it were applicable. Indeed, petitioners do not contend that proof of an overt act was missing; they argue only that their agreement was too indefinite to establish a conspiracy. Pet. 10-14.

Petitioners contend that the evidence is insufficient because the government failed to prove "the *quantity* of drugs to be supplied, the *price* to be paid for the drugs, the *place* for the delivery of the drugs, [and] the *time* for such delivery." Pet. 12; see Pet. 10, 14. Quantity, price, place, and time are not, however, elements of a Section 846 conspiracy, and *United States* v. *Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980), on which petitioners rely, did not hold that such proof is required. See *United States* v. *Sharif*, 817 F.2d 1375, 1377-1379 (9th Cir. 1987) (rejecting interpretation of *Melchor-Lopez* as requiring proof of quantity, price, place, and time). The *Melchor-Lopez* standard for conspiracy is fully consistent with the standard applied by the Third Circuit in this case.[4]

2. Petitioners contend that the court of appeals adopted a standard for determining whether they had taken a "substantial step" for purposes of the attempt count that conflicts with the approach taken by other circuits. Pet. 14-16. The circuits are in agreement, however, on the legal standard governing criminal attempt. To support a conviction, the government must prove that the defendant (1) intended to engage

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[4] Petitioners' analogy between the facts here and in *Melchor-Lopez* also is flawed. In *Melchor-Lopez*, no two alleged conspirators ever came to any agreement. The potential supplier would not agree with the broker to bring the drugs into the United States, 627 F.2d at 888-889, and the potential broker and the buyer never had any "mutual understanding to accomplish a specific objective" or "intention to be bound by any agreement." *Id.* at 889-890. Here, in contrast, although the 30-kilogram drug sale was never consummated, petitioners did agree among themselves to facilitate the sale, and their conspiracy was not dependent upon Giovinazzo's willingness to buy.

in the substantive offense with which he is charged; and (2) took a "substantial step" toward committing that offense. See, *e.g.*, *United States* v. *Dworken*, 855 F.2d 12, 16-17 (1st Cir. 1988); *United States* v. *Manley*, 632 F.2d 978, 987 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981).[5] The determination of what constitutes a "substantial step" is often "a question of degree," *United States* v. *Joyce*, 693 F.2d 838, 841 (8th Cir. 1982) (quoting *Commonwealth* v. *Peaslee*, 59 N.E. 55, 56 (Mass. 1901)), that turns on "the factual circumstances peculiar to each case," 693 F.2d at 841.

Petitioners' quarrel is with the jury's conclusion, based on the evidence, that they took a "substantial step." They seek to draw an analogy between their case and the facts of *United States* v. *Joyce*, *supra*. Pet. 15-16. The Eighth Circuit in *Joyce* reversed an attempt conviction because the defendant had committed no act that "passed the preparation stage so that if it is not interrupted extraneously, it will result in a crime." 693 F.2d at 841-842. The defendant in *Joyce*, carrying $22,000, met with government agents posing as drug dealers and expressed an interest in buying a pound of cocaine for $20,000. When he refused to show the agents the money, and they accordingly refused to show him the cocaine, the defendant left, "with no

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[5] There is no federal statute prescribing the elements of an attempt. Most federal courts apply the definition of a criminal attempt set forth in the Model Penal Code, which provides that a person is guilty of an attempt to commit a crime if he "purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." American Law Institute, Model Penal Code § 5.01(1)(c) (1985).

apparent intention of returning at a later time." *Id.* at 840.

Petitioners, in contrast, passed the mere "preparation stage" and engaged in a criminal attempt to distribute cocaine. Petitioners negotiated with Giovinazzo to purchase cocaine. They arranged for Campos to come to the car wash with a one-kilogram cocaine sample. Unlike the defendant in *Joyce* who "unambiguously refused * * * to purchase the cocaine," 693 F.2d at 842, Nicholas pressed Campos to leave the sample so that it could be shown to the potential buyer, and twice summoned Dellisanti so that he would be available to inspect the sample. Antonino ultimately received a two-gram sample from Campos. Petitioners went far beyond "mere preparation" by actively seeking to distribute the cocaine and were frustrated in their attempt only by Campos's refusal to release a sample earlier. There is thus no issue that warrants further review.[6]

3. Petitioners contend that the district court erred in allowing the government to introduce wiretapped telephone conversations between Campos and petitioners, and between Campos and Ricardo Valente and Erastro Campos Filho. Pet. 16-22. During those conversations, Hamilton Campos sought to arrange the transportation of Brazilian cocaine to the United States and Italy, at least in part to obtain money to repay a debt to Nicholas for

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[6] Petitioners' reliance on *United States* v. *Delvecchio*, 816 F.2d 859 (2d Cir. 1987), is equally unpersuasive. While the court acknowledged the difficulty of determining what constitutes a "substantial step," the court did not articulate any standard that, if applied here, would alter the result in this case.

financing the earlier heroin transaction. IX Pet. C.A. App. 1945-2031. Petitioners claim the recorded conversations were inadmissible hearsay, constituted an attempt to prove character by prior bad acts, and violated their confrontation and due process rights. Pet. 16-22.[7] They also assert that the district court failed properly to instruct the jury that Campos became a government informant in July 1989, and that his statements made after that time should thus not have been considered as co-conspirator statements admitted for their truth. Pet. 19. None of these contentions warrants review.

a. None of the conversations occurring before July 1, 1989, is inadmissible hearsay. The conversations between Campos and petitioners are admissible in their entirety. A party's own statement is, of course, not hearsay. Fed. R. Evid. 801(d)(2)(A). Campos's statements to petitioners are admissible to place petitioners' utterances in context. See *United States* v. *Gutierrez-Chavez*, 842 F.2d 77, 81 (5th Cir. 1988); *United States* v. *Jordan*, 810 F.2d 262, 264 (D.C. Cir.), cert. denied, 481 U.S. 1032 (1987); *United States* v. *Whitman*, 771 F.2d 1348, 1352 (9th Cir. 1985).

The conversations between Campos and Valente and Campos and Erastro Campos were also properly admitted. They were offered not for their truth, but to demonstrate that petitioners were motivated to enter the cocaine conspiracy to obtain repayment of the loan Nicholas made to Campos. Fed. R. Evid. 803(3). By showing petitioners' willingness to

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[7] Petitioners do not specify which conversations they find objectionable; they merely object to tape recordings "made in May 1989, and on other dates preceding July 1, 1989" (Pet. 16), and at least some "post-June 30, 1989" statements (Pet. 19).

discuss participation in heroin distribution, these conversations also helped to rebut petitioners' defense that they were manipulated into illegal activity by federal agents. These telephone calls were interspersed with calls between Campos and petitioners, and because the party conversations were often unintelligible without information about the intervening discussions, they are also admissible to place the party statements in context.

There is no merit to petitioners' contention that the wiretapped telephone conversations were evidence of prior bad acts inadmissible under Federal Rule of Evidence 404(b). See Pet. 16-18. Because the conversations regarding the heroin conspiracy were probative of motive and rebutted petitioners' defense, they were not improperly "offered solely to prove character." *Huddleston* v. *United States*, 485 U.S. 681, 687 (1988). See *United States* v. *Cohen*, 888 F.2d 770, 776 (11th Cir. 1989); *United States* v. *Percy*, 765 F.2d 1199, 1204 (4th Cir. 1985). The conversations described the circumstances leading up to the cocaine distribution conspiracy, and were therefore also admissible as an "integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted." *United States* v. *Richardson*, 764 F.2d 1514, 1521 (11th Cir.) (quoting *United States* v. *Costa*, 691 F.2d 1358, 1361 (11th Cir. 1982)), cert. denied, 474 U.S. 952 (1985). See also *United States* v. *Tate*, 821 F.2d 1328, 1331 (8th Cir. 1987), cert. denied, 484 U.S. 1011 (1988); *United States* v. *Webster*, 750 F.2d 307, 336 (5th Cir. 1984), certs. denied, 471 U.S. 1106 (1985); *United States* v. *Nichols*, 750 F.2d 1260, 1264-1265 (5th Cir. 1985).

The district court specifically weighed the probative value of the wiretaps against their prejudicial potential and found that "given the standard enunciated by [Federal Rule of Evidence] 401, these items certainly are admissible. * * * [T]hey are offered for relevant purposes and I cannot find that there is a valid [Federal Rule of Evidence] 403 objection." I Pet. C.A. App. 066. The district court limited the wiretap evidence by admitting portions that were closely related to the crimes charged, while excluding other portions as irrelevant. *Id.* at 067-076.[8]

b. There is no merit to petitioners' claim that their rights under the Sixth Amendment's Confrontation Clause were violated. The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." In *Idaho* v. *Wright*, 497 U.S. 805 (1990), this Court reaffirmed the rule that an out-of-court statement made by an unavailable declarant may be admitted in evidence without infringing the defendant's confrontation rights if the statement possesses sufficient indicia of reliability to justify dispensing with cross-examination of the declarant. *Id.* at 814-815; see *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Reliability concerns are satisfied, without more, where a challenged statement fits within a firmly rooted hearsay exception. See *Idaho* v. *Wright*, 497 U.S. at 815;

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[8] Petitioners also argue that admission of the recorded conversations violated Federal Rule of Evidence 608(b), which precludes the use of extrinsic evidence to support a witness's credibility. Pet. 20-21. Evidence that is relevant for some other purpose is not barred because it may incidentally corroborate a witness's truthful testimony.

Bourjaily v. *United States*, 483 U.S. 171, 182-183 (1987).

Petitioners did not dispute the trustworthiness of the recorded conversations in the district court, and so cannot now argue that their confrontation rights were violated. In any event, Valente and Erastro Campos's recorded statements were not hearsay as defined by Federal Rule of Evidence 801, and thus do not implicate the Confrontation Clause. See *Tennessee* v. *Street*, 471 U.S. 409, 413-414 (1985). Moreover, Hamilton Campos, who participated in all of the recorded conversations, testified at trial and was subject to vigorous cross-examination. Not only did that diminish any conceivable trustworthiness objection to introduction of the tapes, see *California* v. *Green*, 399 U.S. 149 (1970), it eliminated any Confrontation Clause objection to Hamilton Campos's statements. *United States* v. *Owens*, 484 U.S. 554, 560 (1988).

c. Petitioners also contend that the district court erred in failing to instruct the jury that Campos was a government informant as of July 1, 1989, and that it was therefore legally impossible for him to have been a co-conspirator after that date. Petitioners argue that the jury might have considered Campos's post-July 1 statements for their truth, or have based its conspiracy verdict on a finding that petitioners conspired with Campos, rather than with one another. Pet. 18-20.

Petitioners waived that objection by failing to request the instruction before the charge was read, and then failing to object after hearing the court's instructions. See Fed. R. Crim. P. 30. Petitioners'

claim is thus reviewable only for plain error. Fed. R. Crim. P. 52(b). There was no such error here, in light of Campos's own unambiguous admission that he had been cooperating with the government since July 1989, see III Pet. C.A. App. A0543(A)(222)-A0543(A)(224), and the district court's jury instruction clearly explaining that it is not possible to conspire with a person acting on behalf of the government because that person cannot have the requisite criminal intent.[9]

4. Petitioners next argue that the sentencing court erred in calculating their respective offense levels under the Sentencing Guidelines on the basis of 30 kilograms of cocaine. Petitioners contend that they never intended to distribute that amount of cocaine and that, in any event, they did not have the finances to complete such a transaction. Pet. 22-27. That factbound claim does not warrant further review.

There is no conflict as to the applicable legal standards. Prior to November 1, 1992, Sentencing Guidelines § 2D1.4 set the base offense level for conspiracies involving controlled substances.[10] Section 2D1.4 provided that the offense level for a defendant

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[9] The court instructed that "a person may not conspire with a Government agent or law enforcement person, or someone acting on behalf of the Government, because such a person would not have the records of [*sic*] criminal intent to enter into an illegal agreement." VII Pet. C.A. App. A1645.

[10] Effective November 1, 1992, the Sentencing Commission deleted Guidelines § 2D1.4 and amended the Guidelines for controlled substance offenses to include conspiracies. See United States Sentencing Comm'n, *Guidelines Manual* App. C, amend. 447, at 731 (Nov. 1, 1992).

convicted of conspiracy "shall be the same as if the object of the conspiracy * * * had been completed." The commentary to Guidelines § 2D1.4 provided that if a defendant was convicted of an offense involving negotiation to traffic in a controlled substance, "the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount," unless the defendant lacked the intent and ability to deal in the negotiated amount.[11] The sentencing court determines the "applicable amount" under a preponderance of the evidence standard,[12] and its estimate is subject to review only for clear error.[13]

The district court's finding that petitioners conspired to possess 30 kilograms of cocaine with the

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[11] Prior to November 1, 1992, that commentary was contained in Application Note 1 to Guidelines § 2D1.4. Effective November 1, 1992, the quoted commentary was transferred verbatim to Application Note 12 to Guidelines § 2D1.1. See United States Sentencing Comm'n, *Guidelines Manual* App. C, amend. 447, at 732-733 (Nov. 1, 1992).

[12] See *United States* v. *Moreno*, 899 F.2d 465, 473 (6th Cir. 1990); *United States* v. *Guerra*, 888 F.2d 247, 250-251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989); *United States* v. *Walton*, 908 F.2d 1289, 1300 (6th Cir.), certs. denied, 498 U.S. 906, 989, 990 (1990); see also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-93 (1986) (rejecting clear and convincing standard for sentencing, and explaining that sentencing courts traditionally find facts without reference to any particular burden of proof).

[13] See 18 U.S.C. 3742(e); *United States* v. *Figueroa*, 976 F.2d 1446, 1461 (1st Cir. 1992), cert. denied, 113 S. Ct. 1346 (1993); *United States* v. *Cea*, 963 F.2d 1027, 1030 (7th Cir.), cert. denied, 113 S. Ct. 281 (1992); *United States* v. *Beaulieau*, 959 F.2d 375, 379 (2d Cir. 1992); *United States* v. *Rodriguez*, 896 F.2d 1031, 1034 & n.2 (6th Cir. 1990).

intent to distribute it is amply supported by the record. In telephone conversations between Campos and Nicholas Parlavecchio, Campos originally told Nicholas that 60 "cases," *i.e.*, kilograms, of cocaine were available. During a conversation on July 20, 1989, Nicholas told Campos "we'll take ten," referring to ten kilograms to be sold, through petitioners, to Giovinazzo. IX Pet. C.A. App. 2087-2089. Petitioners point to Nicholas's later comments that he wanted "[m]aybe a 2 or 3 here that I could possibly," or "[m]aybe 5, I don't know," as evidence that a much smaller quantity was under negotiation, Pet. 6-7, 24-25, but ignore the fact that Nicholas was referring to obtaining the amounts "here" (in New Jersey), in addition to the ten "down there" (in Florida), IX Pet. C.A. App. 2087-2088, 2091-2095, and that those conversations took place before additional amounts were negotiated. On July 25, 1989, Nicholas told Campos that there were now two additional buyers for ten kilograms apiece. Nicholas explained that if the cocaine's quality were satisfactory, they would sell ten kilograms to each of three different people. *Id.* at 2105. Two days later, Nicholas again relayed to Campos that the amount would be 30 kilograms: when Campos referred to a figure of three, Nicholas corrected him, declaring "What three? Thirty." *Id.* at 2135.

On the basis of these conversations, the district court concluded by a preponderance of the evidence that petitioners were not "puffing" and intended to distribute at least 30 kilograms of cocaine if the quality were acceptable to the buyers. VIII Pet. C.A. App. A1889. The court similarly rejected petitioners' argument that they lacked the financial resources to

consummate the deal because, as brokers for the sale, petitioners were not required to advance any money. *Id.* at A1879.[14]

5. Petitioners argue that the courts below erred in rejecting the doctrine of "sentencing entrapment" as a basis for a downward departure from their Guidelines sentencing range. Pet. 27-29. Petitioners contend that they were sentenced based on discussions about "enormously elevated" quantities of drugs that were initiated by Campos, the government informant, "solely * * * for the purpose of elevating any potential sentence they could receive, if convicted." Pet. 29.

Several courts have recognized, at least in theory, a doctrine of "sentencing entrapment." *E.g.*, *United States* v. *Jones*, No. 93-5320 (4th Cir. Mar. 2, 1994) (to be reported at 18 F.3d 1145), slip op. 13-19; *United States* v. *Cotts*, 14 F.3d 300, 304-306 & n.2 (7th Cir. 1994); *United States* v. *Barth*, 990 F.2d 422, 424-425 (8th Cir. 1993); *United States* v. *Rogers*, 982 F.2d 1241,

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[14] Petitioners rely (Pet. 26 & n.5) on *United States* v. *Miele*, 989 F.2d 659 (3d Cir. 1993); *United States* v. *Johnson*, 943 F.2d 383, 387-388 (4th Cir.), cert. denied, 112 S. Ct. 667 (1991); *United States* v. *Richardson*, 939 F.2d 135, 142 (4th Cir.), certs. denied, 112 S. Ct. 599 (1991), 112 S. Ct. 942 (1992); *United States* v. *Jacobo*, 934 F.2d 411, 416-418 (2d Cir. 1991); *United States* v. *Reyes*, 930 F.2d 310, 314-316 (3d Cir. 1991); and *United States* v. *Foley*, 906 F.2d 1261 (8th Cir. 1990). None of those cases sets forth an interpretation of the Guidelines that is at odds with that employed by the court in this case. In each of those cases, the court either failed to make any findings regarding quantity, or considered evidence that was patently unreliable. None dealt with the circumstance at issue in this case, in which a defendant himself repeatedly admitted the amounts at issue.

1245 (8th Cir.), cert. denied, 113 S. Ct. 3017 (1993); *United States* v. *Connell*, 960 F.2d 191, 194-195 (1st Cir. 1992); *United States* v. *Lenfesty*, 923 F.2d 1293, 1300 (8th Cir.), cert. denied, 499 U.S. 968 (1991); *United States* v. *Stuart*, 923 F.2d 607, 613-614 (8th Cir.), certs. denied, 499 U.S. 967, 112 S. Ct. 145 (1991). But see *United States* v. *Williams*, 954 F.2d 668, 673 (11th Cir. 1992); *United States* v. *Riles*, 928 F.2d 339, 342 (10th Cir. 1991). To our knowledge, no court of appeals has yet found, however, that such entrapment occurred on the facts before it.

There are no grounds here for any finding of sentencing entrapment under any circuit's standard. The 30-kilogram quantity on which the district court based the sentences was initiated not by the government, but by Nicholas Parlavecchio. On July 27, 1989, Nicholas expressly informed Campos that there was "the potential for 30," and when told by Campos that "three" could be "done right away," again insisted "What three? Thirty." IX Pet. C.A. App. 2133, 2135. The quantity used for sentencing was not the product of any "outrageous official conduct" that overcame petitioners' will and predisposition to deal only in smaller quantities of drugs. See *Barth*, 990 F.2d at 424; *Rogers*, 982 F.2d at 1245. Because there is no basis for concluding that the government inflated the quantity of cocaine involved in petitioners' crime in order to increase their sentences, the concept of "sentencing entrapment," even if it were accepted in principle, would not come into play.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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